

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY JANE KRECKLOW
Claimant

VS.

**ASBURY-SALINA REGIONAL
MEDICAL CENTER**
Respondent

AND

WAUSAU UNDERWRITERS INS. CO.
Insurance Carrier

Docket No. 94,353

ORDER

Claimant requested review of the September 22, 2006 Post-Award Order by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 5, 2006.

APPEARANCES

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant's counsel post-award attorneys fees of \$2,184 and expenses of \$176.30. The expenses associated with Dr. Parks' deposition, in the amount of \$585, were denied.

The claimant requests review of a single issue of whether the respondent should reimburse claimant for the cost of Dr. Parks' deposition. Although claimant maintains her

counsel is entitled to attorney's fees for pursuing this appeal, she specifically reserves that issue and requests that the matter be submitted to the ALJ for initial consideration at the conclusion of this appeal.¹

Respondent contends the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sought post-award medical benefits stemming from her 1980 back injury. At various times claimant and respondent disagreed on the course of her treatment. And in connection with that most recent dispute and the resulting post-award proceedings, claimant sought the assistance of Dr. Parks and he was deposed. The necessity of claimant's post-award medical request is, at present, no longer in dispute. However, claimant also sought reimbursement of the expert witness fees charge by Dr. Parks, asserting that the Board's earlier holdings on this issue is "contrary to the plain language of the statute, as well as the intent of the legislature."²

Claimant argues that -

It is extremely clear that medical providers testifying in post Award medical situations are witnesses who are entitled to fees. Thus, the language of the statute is clear in speaking to "witness fees." In fact, the legislature could not have failed to understand that probably the only witness fees in a post Award medical situation is the fees of the medical witness. Stated alternatively, in a post Award situation, claimant will not be paid a witness fee, employers will not be paid a witness fee, there are no vocational experts and no accident reconstructionists. It is totally illogical to make the reference to witness fees in a post Award medical situation and exclude experts.³

The Board has ruled in the past and continues to believe that the plain language of the statute does not encompass a parties' expense in retaining experts.⁴

¹ Claimant's Brief at 6 (filed Oct. 18, 2006).

² *Id.* at 2-3.

³ *Id.* at 3-4.

⁴ The Board has recently (and repeatedly) addressed this issue. In each instance, the Board has concluded that the post-award statute does not allow a party to recover the cost of expert witness fees in post-award medical proceedings. *Deming v. National Coop Refinery*, No. 201,932, 2003 WL 22704135 (Kan.

Claimant argues the it was clearly the intent of the legislature to place the entire cost of a post-award request for medical treatment, whether granted or not, upon respondent. Such a view would require the Board to ignore the specific legislative intent *against* shifting all of the expenses associated with the litigation process. For example, K.S.A. 44-510h(b)(2) prohibits a claimant from using the unauthorized medical allowance to obtain a functional impairment rating, K.S.A. 44-555 allows the ALJ to assess reporter fees to any party, and K.A.R. 51-9-6 allows the fees for a neutral physician's report to be assessed to any party. Furthermore, there is no provision for assessing claimant's attorney fees against respondent for pre-award services rendered, even when the only issue is medical treatment and there is no monetary award from which a claimant's attorney can take a fee.

If the legislature wanted to ensure the claimant an unfettered and expense-free post award system, then the statute could have indicated as much. As it is, K.S.A. 44-510k provides that an ALJ "may" award claimant's attorney's fees (regardless of the outcome) and costs. The Board finds that "costs" do not include the claimant's expert witness fees. And absent a statutory mandate, the Board has no inherent power to award costs beyond statutory authorization.⁵

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 22, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

WCAB Oct. 31, 2003); *Lane v. Boan Masonry Company, Inc.*, No. 268,372, 2005 WL 3030736 (Kan. WCAB Oct. 14, 2005); *Foroughi v. Nurses House Call*, Nos. 205,741 & 208,027, 2006 WL 1275426 (Kan. WCAB Apr. 2006); *Hoge v. Concrete Service Co.*, No. 251,937, _____ WL _____ (Kan. WCAB Nov. 7, 2006).

⁵ *Grant v. Chappel*, 22 Kan. App. 2d 398, Syl. ¶ 2, 916 P.2d 723 (1996).

DISSENT

The undersigned Board Member would grant claimant's request to allow him to recover the cost of the expert fees associated with this post-award request. Claimant's counsel makes a compelling argument, in that claimants are continually put to the financial test in establishing their right to benefits, even on a post-award basis. The cost of retaining an expert to establish a claimant's entitlement to further treatment is no less necessary to a post-award request than the medical records are or the presence of one's attorney. Yet, the Board has consistently allowed the recovery of mileage and copy costs, but has refused to allow expert fees. Practically speaking, if the cost of retaining an expert to testify on one's behalf is not considered a recoverable expense, it may deter a claimant from requesting additional medical benefits.

Moreover, K.S.A. 44-510k explicitly provides that witness fees may be awarded in these requests for post award medical benefits. And the legislature did not limit the nature of those witness fees. For these reasons, this Board Member would grant claimant's request for reimbursement of the expenses associated with Dr. Parks' deposition, in the amount of \$585.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge